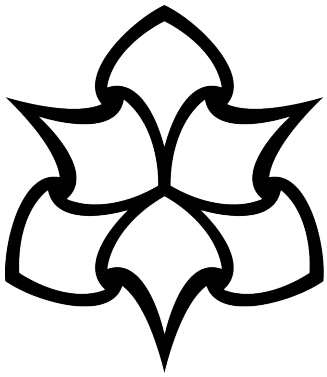

Chapter One

About the Impossibility of Absolute State Sovereignty. The Modern Era and the Early Legal Positivist Claim

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Abstract State sovereignty is often thought to be and seen as absolute, unlimited. However, there is no such a thing as absolute state sovereignty. Indeed, absolute or unlimited sovereignty is impossible because all sovereignty is necessarily underpinned by its conditions of possibility. The present chapter consists of two main parts. Firstly, and in order to show more clearly how sovereignty is limited, two kinds of agents are introduced: a) individuals; and b) states. The aim is to demonstrate how different sorts of constraints or limitations operate in relation to individuals and states without diminishing their respective sovereignties. Secondly, the chapter identifies specific theorists that take sovereignty to be absolute in the modern era, focusing in particular on two bodies of literature that constitute the roots for current legal positivism—i.e. Jean Bodin and Thomas Hobbes—and argues that in both cases they introduce conceptual, substantial, and contextual limitations. I argue that the modern era starts with a relative essence of sovereignty that has its origin in the working logic of fragmented regulatory governance. With this early and disjointed background of a national and transnational plurality of sources both Bodin and Hobbes aim to bring together these heterogeneous elements under the contextualisation of the paradox of sovereignty. The implications of understanding state sovereignty as limited rather than absolute are several, both directly and indirectly. A main immediate consequence is that sovereign states can cooperate together, limit their sovereignty and still be considered sovereign.

Keywords State sovereignty; absolute sovereignty; limited sovereignty; unlimited sovereignty; legal positivism

1. Introduction

State sovereignty is often thought to be and seen as absolute, unlimited. However, there is no such a thing as absolute state sovereignty.[1] Indeed, I maintain that absolute or unlimited sovereignty is impossible because all sovereignty is necessarily underpinned by its conditions of possibility. So, this chapter forms part of a large theoretical enterprise and historical survey of the notion and concept of 'sovereignty' from Ancient to Contemporary times, the overall argument and purpose of which is to defend the idea that limited sovereignty is the norm, though the nature of the limitations varies.

The present chapter will have two main parts. Firstly, and in order to show more clearly how sovereignty is limited, I will introduce two kinds of agents: a) individuals; and b) states.

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[1] Núñez (2017), (2015), (2014), (2011).

This time the aim is to demonstrate how different sorts of constraints or limitations operate in relation to individuals and states without diminishing their respective sovereignties. Secondly, I will show how sovereignty was not absolute in the modern era. What happens after the mediaeval period is crucial, because that is when theories of absolute sovereignty are presented, like those of Jean Bodin and Thomas Hobbes. These two bodies of literature that constitute the roots for current legal positivism introduce conceptual, substantial, and contextual limitations to sovereignty. Moreover, sovereignty is in practice curtailed in modernity by many elements that are particular to this period in history and that are still existent: a) by the increasing power of the people—this could in principle result in a new kind of unchecked sovereignty, but is itself (as the theories from John Locke and Jean-Jacques Rousseau will show) checked by; b) increased emphasis on individual rights; c) the use of separation of legislative and executive powers; and d) international agreements, some voluntary, some required.

Such a view of sovereignty might shed new light on whether the positivist approach to law (or normative phenomena) can assist scholars and practitioners in conceptualising/operationalising current modes of regulation at the global and transnational level(s). Being sovereignty never absolute and always limited, the fragmentation of regulatory sources and dynamics at the post-national (i.e. global and transnational) level(s) (or relative authority) is not incompatible with the nation-state inner pluralist settings.

The implications of understanding state sovereignty as limited rather than absolute are several, both directly and indirectly. A main immediate consequence is that individuals—and in a larger context, sovereign states, can cooperate together, limit their sovereignty and still be considered sovereign. So as it is not possible to have absolute sovereignty, inter-state cooperation is perfectly in tune with the modern idea of a fully sovereign state and shared projects can be worked out. Therein, the indirect resultant implications are many, for instance, shared sovereignty with regards third territories over which two sovereign States previously argued their sovereignty rights—e.g. Falkland/Malvinas Islands, Gibraltar, Kashmir, and many others. Furthermore, and to a global extent, the Kantian idea of a global federation of free states becomes possible.

In the following paragraphs we will see that the main reason for authority to take the form of sovereignty has to do with beliefs, assumptions and justifications that respond to societal evolution. The concept of 'sovereignty' is a modern one but the elements that give it flesh have been always present in our societies (at least in the Western world). And that is the purpose of the historical account; to show how the ideas developed by modern and contemporary scholars depart from beliefs, assumptions and justifications that had been already used before when referring to authority. Furthermore, this form of viewing authority has always had in a way or another certain limitations. To put it in other terms, the so called sovereign authorities from the Ancient and Middle Ages and their characteristics find a parallel in the modern and contemporary idea of sovereign states. The notions once applicable to the individual (and hence the limitations to those notions) have been anthropomorphised in that of the state.

A historical account of the early use of the idea and notion of sovereignty will show how the sovereign was regarded (in Western Europe, at least) as limited. I maintain there are what we may call three different stages in the development of 'sovereignty': first, the idea or notion (Ancient Age); then, the use of the word 'sovereignty' for the first time but in a different context—literature (Mediaeval Age); finally, the legal and political clearly defined concept (Modern Age). This account will introduce all the three possible scenarios (sovereign as one, a few or the many). However, the important note will be given by the fact that in all cases 'sovereignty' understood as supreme authority appears to be limited—i.e. not absolute.

Why a historical review of a concept that was created in the Modern Age? It is a fact that in relation specifically to the state and as a juridical idea, the concept of 'sovereignty' was brought to life between the 15th and 16th centuries. But a brief account of the different uses of the idea of sovereignty throughout the Ancient and Middle Ages already demonstrated fundamentally that its basic elements have been always present but it has been an attribute of different subjects.

The period discussed—i.e. the Modern Ages—is colossal, and therein it may be that many of the historical assertions seem sprawling and overarching. Can we really talk about the Modern Ages in this fashion, let alone make historical claims about that period based on a few references? In other words, it may be argued that the selection could have been either narrower or broader—why these specific thinkers and not others? It is imperative for the success of this theoretical enterprise to show how a concept that is thought to be absolute can be (in fact, it is) limited. The main point is to bring evidence that there have been thinkers throughout human history who have shown that the notion or concept of 'sovereignty' can be limited. Some of these philosophers maintained nevertheless that sovereignty is an absolute idea; however, their words imply that there are limitations on what they claimed to be unlimited. To quote and analyse every single thinker from the Modern Ages and school of ideas related to sovereignty is empirically impossible—at least for the scope of a chapter—and theoretically unnecessary. At the same time, at least a glimpse of the idea of limited sovereignty is a 'must' in order to better understand the modern concept.

Two last clarifications must be highlighted. Firstly, we will see that the limitations to sovereignty may be actual, theoretical, or both. That is to say, we will see that: a) the powers of the ruler were always in some way limited; and/or b) theories always introduce some limitations to sovereignty, even though some theorists did not admit it. Secondly, we will also see that these actual and/or theoretical limitations have to do with either internal sovereignty, external sovereignty or both. However, to refer to external and internal sovereignty is to refer to two facets of the same phenomena. Therefore, the limitations to one facet always affect in some way sovereignty as a whole.

2. Self-ownership, Sovereignty and Different Types of Constraints

Individuals—in large, states—can have relationships of different kinds with their respective peers. In brief, both sovereign individuals and sovereign States may cooperate together with their respective peers; they may even enter into commitments and 'somehow' limit their freedom. But how far can their freedom be limited? I aim to show that a) the limitations on sovereignty are inevitable—i.e. it is not just that up to now sovereignty has always been limited, but that for states to operate together it must be; and b) that there are limitations on sovereignty which do not mean that the state is no longer sovereign.

In the following I will show how different sorts of constraints or limitations operate in relation to sovereign individuals and sovereign states. There are many ways in which these constraints or limitations may be classified. I will propose a classification of these constraints or limitations based on a very simple and broad criterion: by whom they are imposed. The only goal at this point is to better illustrate with a simple classification how these limitations or constraints operate and differentiate from each other. Once we have a general understanding of the kind of limitations we are dealing with I will focus on their meaning in legal and political sciences.

In general sovereign individuals and sovereign states may have two kinds of constraints—i.e. their freedom can be limited by: a) self-imposed constraints; b) externally imposed

constraints. The first group of constraints can be characterised as those by which a sovereign individual—or a sovereign state—voluntary curtails his/its freedom. For instance, the case in which an agent enters voluntarily into commitments with others—e.g. to become allies. Indeed, relations between sovereign states would be impossible without these agreements.

The second group of constraints are those imposed either by: 1) other sovereign individuals or sovereign states; 2) the context or the environment they are part of—specifically, the national or international scenario they are members of. The first sub-group of externally imposed constraints refers to what sovereign individuals or sovereign states can legitimately do in relation to their peers or what others can legitimately do to them. The second sub-group of externally imposed constraints have to do with facts and rules that either sovereign individuals or sovereign states have to deal with only because they are members of a certain national or the international community—e.g. states find themselves subject to international public law and newly formed states have to comply with pre-existing international law; an individual is born in a certain country and has to comply with the pre-existing law of that country.

It is relatively easy to recognise the first group of constraints—i.e. the ones that either sovereign individuals or sovereign states impose on themselves. Indeed they are voluntary and self-imposed since sovereign individuals and sovereign States limit their freedom without any external imposition—i.e. they freely decide to cooperate with each other. A different scenario is given when either a sovereign individual or a sovereign state 'accept' a limitation. That is because 'accepting' implies external interference, whether from another agent or the context.

Ergo, I will understand that in the case of self-imposed limitations the freedom of sovereign individuals and sovereign states is limited in their individuality—i.e. I. In contrast, in the case of externally imposed limitations the freedom of sovereign individuals and sovereign states is limited in matters relating to their peers—i.e. you and I; or in their relationship with the context—i.e. I, us, the nation, the international community.

In the following paragraphs we will review the way these different types of constraints operate in relation to sovereign individuals and sovereign states.

The first kind of limitation that does not destroy sovereignty is one that is self-imposed—e.g. by voluntary entering into an agreement. In fact, relations between sovereign states would be impossible without these agreements. That is, self-imposed limitations do not jeopardise sovereignty. In fact, they may be seen as examples of it.

The second kind of limitation is externally imposed since it either matters the relationships with peers or the context. The first subgroup of externally imposed limitations only exists because there are other agents. Hence, they are imposed by the mere presence of other individuals or states when they somehow limit their freedom. It is true that individuals and states may limit their respective peers in different manners. In order to show more clearly how this kind of limitations work—i.e. externally imposed because of the mere presence of others—I will focus on what happens in instances in which either individuals or states have their freedom limited by their respective peers.

One of the ways to understand the relationship between an individual and himself, other people and all that surrounds him is self-ownership (also called property in the person).[2] In self-ownership, each individual owns both morally and legally his person and natural talents and is free to use them and is morally obliged not to invade someone else's sphere of

[2] The expression "property in the person" is from Pateman (2002). For a relation between self-ownership and property see Gerson (2012); Ryan (1994); Mack (1990).

freedom—like a negative liberty.[3] However, even if limitations imposed by others are justified—for whatever reason—how can limitations to negative liberty be tolerated and still feel like self-owners?[4] I refer here to republican liberty that, unlike negative liberty, understands freedom as non-domination.[5] Then, a free man, rather than a slave, may accept a certain level of limitations—negative liberty; and still be a free man. That is because freedom—i.e. republican freedom—understood as non-domination means independence from unwanted arbitrary and unreasonable restrictions. *Mutatis mutandis*, a state can still be sovereign and be subject to some limitations; it just cannot be subject to domination by another state. To be more precise, it is not that non-domination and freedom are different conceptions. For the purpose of this chapter non-domination is the way in which republican freedom will be understood.

Before I continue with the analysis, I will clarify further the meaning of non-domination. Without intending to be an exhaustive revision of the concept, and bearing in mind the nature of this chapter, I will provide a preliminary sketch of the idea of non-domination. I will merely attempt to conceptualise how non-domination will be understood here, leaving its full assessment for subsequent research. Having made that clear, I will understand that domination ". . . refers to the relatively unrestrained and systematic (even if unexercised) ability of a group or individuals to exert power over others in pursuit of their own interests at the expense of those subordinate to them."[6] Consequently, non-domination means for this chapter the capacity for someone's affairs not to be arbitrary interfered with by someone else.

The previous paragraphs showed that individuals—and on a larger scale, states—are sovereign in the sense they have autonomous free will to choose to act or not to act. Nevertheless, sovereign individuals and sovereign states have relationships of different kinds with their respective peers that somehow may limit their freedom. So the issue here is whether these limits to their freedom are arbitrary restrictions or not—i.e. whether there is domination or non-domination in their interrelation.

In the case of sovereign individuals, to conduct their interactions or interrelations under the idea of non-domination means that no sovereign individual is entitled to limit someone else's freedom in an arbitrary manner. That is to say, interactions amongst sovereign individuals happen in any society and they may imply restrictions with regards their individual freedom. However, none of these restrictions can be unilaterally and arbitrarily imposed. Therefore, the issue of inequalities amongst sovereign individuals—e.g. poor and rich—that could lead to abuse of power and control is avoided.[7]

Similarly, in the case of sovereign states, to conduct their interactions or interrelations under the idea of non-domination results in no sovereign state being entitled to restrict the freedom of any other sovereign state in an arbitrary manner. In other words, interactions amongst sovereign states happen as part of global relationships in the international scenario and they may bring about restrictions in relation to states' freedom. However, as I have made clear before when dealing with sovereign individuals, none of these restrictions can be

[3] Liberty can be defined—in principle—as the ability to decide upon ones' actions and omissions. Negative liberty can be seen as the absence of interferences, freedom of restraints (e.g. constraints, barriers, etc.); positive liberty is the freedom to form and make actual a rational and reasonable plan of life. For further analysis see Berlin (1969). For interpretations on the topic see Kramer (2001); Pettit (2006); and many others.

[4] See Skinner (2003); Shaw (2003); and many others.

[5] There may be different accounts of republican liberty. See Reiff (2013), pp. 288–289, in partic. fn. 24 and 25. For a view on republican liberty as non-domination see Lovett (2010), pp. 155–156.

[6] Laborde (2010), p. 54. For a more detailed account about republican freedom and non-domination see Halldenius (2010); and Pettit (2010).

[7] For more details about individuals and non-domination see Laborde (2010), pp. 51–52.

unilaterally and arbitrarily imposed. So, the potential problem of disparities amongst sovereign states—e.g. resources and power—is neutralised.[8]

The significance of understanding freedom as non-domination for our thinking of sovereignty is crucial because a state which freedom was limited would still be considered sovereign since any limitation would have had to be either accepted by such state, or not unreasonably or arbitrarily imposed. A state can still be subject to other kinds of limitations, both internal and external, and still be sovereign within the notion of republican freedom, just as an individual can be subject to some limitation, and still be a self-owner in terms of republican freedom.

For example, in the case of an individual, self-ownership implies that ". . . every person is morally entitled to full private property in his own person and powers."[9] From there, the notion can be extended to the environment and things and objects related to. In other words, an individual owns himself, his actions and omissions, and the product of his labour—to discuss here how the individual obtains the property of any object is out of the scope of this chapter. If that same individual was not fully free to decide his way of action in relation to himself or things that belonged to him, his self-ownership would be somehow diminished. By way of example, an individual cannot claim a particular piece of land is his if someone else has any right over it such as right of way or a portion of income it may generate. Similarly, an individual is not fully the owner even of himself if someone has the right to dictate the way he has to proceed—or omit to proceed—or has a certain right over the benefits he generates—i.e. my liberty is infringed in a negative form.

The same way of reasoning can be replicated when dealing with states: a State is sovereign—as an individual has self-ownership—if and only if its representatives are free to decide how the state acts or omits to act both internally and internationally. If that same state was not fully free to decide its way of action in relation to its internal or international affairs, its sovereignty—self-ownership—would be somehow affected—as it happens to pseudo-States, failed states, etc. But like self-ownership, this does not mean it is not still sovereign. Indeed, while states' sovereignty limits one another's negative freedom, it does not obviously limit their sovereignty at all.

In short, sovereign individuals in a community have self-ownership. Being a member in a community implies interrelation with others that can limit (interfere with) their freedom. But that does not imply *per se* sacrificing it. Similarly, states in the international community have sovereignty. As part of a community, they have interrelations with others that may interfere with (limit) their freedom. But that does not mean that *per se* they sacrifice their sovereignty.

Thereby, we can see that in the case of sovereign individuals as well as sovereign states the interrelation with peers may limit their freedom. These are externally imposed constraints—i.e. they exist because both sovereign individuals and sovereign States are part of communities and hence they interrelate with others' freedom. Nevertheless, are these the only constraints they have?

In addition to self-imposed limitations and externally imposed limitations in what matters relationships with peers, there is still a second subgroup of external limitations to consider: external limitations because of the context or environment. In any kind of social organisation men are part of (families, villages, communities, states) their members have a choice that only depends on their free will to be part—or not—of them. It is true that we are all born in certain States or families so we cannot simply choose to join or to leave them and join some other group. In that respect, for Locke, it is free will that gives legitimacy to any societal

[8] Laborde (2010), p. 54.
[9] Cohen and Graham (1990), p. 25.

organisation: an individual has both the right to be part of a community and to leave it, depending only on his decision. Nevertheless, for an individual even to leave a community is no longer possible (hence certain limitations exist by default). In Locke's days some people could find uninhabited parts of the world. But now, a) most people cannot leave the state they find themselves in; and b) if they can, they have to go to some other state. These are also constraints externally imposed but in virtue of the environment they are in.

To a similar extent, it may be said that states do not have the option of leaving the international scene. So there are some limitations that are now compulsory, because there is no other option. Every sovereign individual in every society is actually affected by the same compulsory constraint. The same can be said about sovereign states: even if not having the choice to leave the international scene is the case in international relations, it applies to every sovereign state. In other words, all of them have these external constraints because they are members of a community with pre-existing facts and rules.

Both sovereign individuals and sovereign states are obliged to accept the constraint of being part of a larger society (national or international), but they are still in the same relative situation to that of their peers. That is to say, the starting point for all of them is the same, a state of things that could not be abandoned. So, the fact that sovereign individuals and sovereign states had an actual possibility to leave their respective societies (national or international) or not does not change the prerogative they have in order to impose self-constraints or accept external ones in regard to their self-ownership or sovereignty respectively. That is because the basic freedom both individuals and States have is equal freedom, not total freedom. More precisely, they have equal moral and legal freedom but this does not necessarily imply physical or economic equality.

We have learnt from the previous section that a sovereign state may have two kinds of limitations: a) self-imposed limitations; b) externally imposed limitations. Thus, the externally imposed limitations may be because of other sovereign states or because of the context or environment. In any case, despite the fact that an individual and a state may have to face different kinds of restrictions, they are still fully sovereign. It is time now to identify specific theories or bodies of literature that take sovereignty to be absolute in Modern times. In the following section we will have a brief historical overview of a few major thinkers and explore their ideas about sovereignty and its limitations.

3. Modern Times: Between Legal Positivism and Sovereignty

Arguably, legal positivism as a clearly defined thesis starts with Bentham in England. It is true there are ancient and mediaeval antecedents for a *sensu amplo* account.[10] But Bentham's views were based in more contemporary literature to his time: Hobbes and Hume. And in the time of Hobbes and his writings in England we can find a parallel in continental Europe in the works of Bodin in what has to do with the concept central to this chapter: 'sovereignty.' *Sensu stricto* legal positivism maintains that the existence and content of law depends on social facts only. That means that merits or demerits about the law do not determine if it exists or does not. In Austin's words: "The existence of law is one thing; its merit and demerit another."[11] According to this thesis, the fact that the law is moral or immoral does not affect its existence. Law exists as long as there are certain social standards recognised in order to *posit* the law−i.e. broadly, to create and apply the law. Examples of these social standards are legislative acts, judicial decisions, social practices in the form of customs, to

[10] Finnis (1996).
[11] Austin (1832), p. 157.

name only a few. They may be just or unjust−i.e. merit or demerit−but in any case they are all socially accepted standards for the law to exist. Both Bodin and Hobbes construct a theory around the concept of 'sovereignty' that has to do with understanding the law as a social phenomena, a creation by men for men regardless of its merits or demerits. Due to the particular historical circumstances in continental Europe and England both thinkers find themselves in the working logic of fragmented regulatory governance. With this early and disjointed background of a national and transnational plurality of sources both Bodin and Hobbes aim to bring together these heterogeneous elements under the contextualisation of the paradox of sovereignty.

The key to understand this early positivism and the birth of the concept of 'sovereignty' applied to law and politics has to do with the historical context. Mediaeval Europe integrated law, politics and religion into one. That is to say, Europe before 'sovereignty' had to do with law and politics always intertwined with religion.[12] The change of paradigm comes with Bodin in continental Europe and with Hobbes in England. With both Bodin and Hobbes it will be the 'human' sovereign the one that creates the law; not God or those on his behalf. The fact that the lawmaking power changes from a supra-empirical normative authority (God) to an empirical authority such as the King or the Leviathan (or even 'the people') marks the birth of positive law.[13]

Therein, a concept that has to do with, I maintain, early legal positivism is 'sovereignty.' It is a fact that in relation specifically to the state and as a juridical idea, the concept of 'sovereignty' was brought to life between the 15th and 16th centuries. Bearing that in mind, I agree with Kostakopoulou in that ". . . sovereignty has been informed by Bodin's, Hobbes' and Austin's monistic conceptions of sovereign power. But these conceptions represent only certain, historically conditioned, readings of sovereignty. The theory of sovereignty is not a single and unified tradition."[14] Coincidentally, Bodin and Hobbes can be classed as early legal positivists since it is central to their works the idea that law is created and applied by a secular sovereign without any particular reference to its merits or demerits−i.e. the law exists according to a social standard that is particular to this time in history.

The reason behind these bodies of literature is, I submit, the historical context these theories are developed in. Historical events and theoretical constructions are intertwined. A succinct overview of the historical period in question will help to better understand why although two of these thinkers in particular−i.e. Bodin and Hobbes−include the notion of absoluteness in the concept of 'sovereignty' they did not mean unlimited, unfettered power. In that sense, I follow Stroud when he says that "[t]he largest difficulty in legal history is precisely that we look at past evidence in the light of later assumptions, including our own assumptions about the nature and working of law itself."[15] Therein, the historical context in which these two theories are presented is the key to see clearly why they use the term 'absolute' but both theories as well include limitations to 'sovereignty.' That is because both these views have a legal positivist claim: law's existence depends only on social facts. For both these authors these facts have to do with what the 'absolute' sovereign understands as law.

While the Mediaeval Ages saw sovereignty linked to moral and religious elements; modernity is mainly characterised by a secular power trying to separate itself from the Church and at the same time to obtain total control over its affairs in response to social

[12] Jackson (2010), p. 24.
[13] Grimm (2015), p. 21.
[14] Kostakopoulou (2002), p. 135.
[15] Stroud (2003), p. xvi.

disorder.[16] Indeed, the transition between the Middle Ages and the modern era can be seen as embodied within social and political struggle. With this context, bodies of theories appeared with the main aim of bringing societal order through political cohesion. Classical Greek and Roman authors give the Modern Ages the basis for supporting this enterprise.[17]

3.1 In Continental Europe, Bodin

The word 'sovereignty' had been used before,[18] but it is Bodin in France who mainly defines its characteristics as known nowadays in what has to do with states within legal and political sciences. There are indeed limitations to power that have to do with actual circumstances−i.e. social facts determine what the law is. Western Europe had a struggle between Church and state; principalities and other societal organisations were fighting for power.[19] In response to this situation, Bodin offers his positivist theory of supposedly unlimited sovereignty. Indeed, I argue that it is a theory that only uses the word 'absolute' as an ideal expression. However, even at the theoretical level Bodin himself introduces some limitations on sovereignty. At first glance, Bodin's definition seems to grant unlimited sovereignty in order to stop and control that chaos. His already classical characterisation of sovereignty states:

> *Aieltie* or Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth . . .[20]

Literally interpreted, the above definition clearly states sovereignty's main elements: highest, absolute and perpetual power. I am not going to dwell in the analysis of each of the aforementioned terms since there is a profuse and proficient bibliography about this point with regards Bodin's 'sovereignty.' [21] Indeed, at first glance it seems as if Bodin maintains the idea of absolute sovereignty. However, the key in understanding his way of thinking is situating his theory within the historical period it was presented. The state of affairs is that of chaos. Therefore, he intends to control that chaos through a unified concept of political power, that is his notion of 'sovereignty.'

For a more complete picture it is crucial to revisit what he means with 'sovereignty' as a unified concept of political power. In order to distinguish the right of sovereignty from any other Bodin argues that ". . . one ought to investigate who can give authority to magistrates, who can take it away, who can make or repeal laws-whether one citizen or a small part of the citizens or a greater part . . ."[22] It is clear that for Bodin the law exists only if the sovereign says so−i.e. the positivist claim. Therein, and in order to stop social and political chaos, Bodin unifies the concept of political power through his characterisation of an 'absolute' sovereignty only to the extent it serves to that goal. But that is different from supporting the statement that political power is unlimited.

It is a fact that Bodin understands sovereignty as limited. For the purpose of this chapter, it is worth to briefly mention that Bodin includes in his work two kinds of limitations: first,

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[16] Hinsley (1986), p. 69 and p. 126; Opello (1999), part. II, Chapter 4; Van Creveld (2004), Chapter 3; D'Entreves (1948), part II, Chapters 4–6.
[17] Hinsley 1986), p. 72.
[18] Núñez (2017), (2015), (2014), (2011).
[19] Hinsley (1986), p. 120.
[20] Bodin (1903), p. 84.
[21] For a particularly interesting work about the semiotics of the word "sovereignty" as presented by Bodin see Beaulac (2004), Chapter 6. See also Maritain (1950), Lewis (1968); and many others.
[22] Bodin (1969), p. 178.

those related to natural law; second, those related to customary law and property rights.[23] Particular examples of these limitations are the law of succession, required in order to have a perpetual sovereignty, and the prescriptions to respect private property, keep one's promises and (specifically related to private property), the sovereign's obligation to ask the consent of his citizens before imposing taxes.[24] All these limitations have to do with a legal positivist view−i.e. both sovereignty and its limitations are for Bodin social facts regardless of their merit or demerit.

3.2 In England, Hobbes

Similarly to continental Europe, fights for power were also present in England, arguably limiting sovereignty in actual terms. As a theoretical reaction, Hobbes gives shape to what is labelled as absolute sovereignty.[25] Nevertheless, his work also includes limitations on that supposed absoluteness. Like his predecessors, he followed the Greek tradition. Like the ancient philosophers, he uses the metaphor of the human body as a representation of the city (or state for the purpose of this chapter).[26] He gives the idea or notion of sovereignty a key role to play ". . . in which the sovereignty is an artificial soul, as giving life and motion to the whole body . . .[27] Sovereignty is no longer just another element for him. He clearly thinks it is a necessary one in order to have a state or city. As a body without soul is an inert thing or entity a state without a sovereign is only a group of people together in a certain land without direction or in anarchy. We could include Hobbes together with Locke and Rousseau as a contractualist. However, he implies something further than a contract: a merge of wills.[28] The superman, the Leviathan, was born. Hobbes characterises a sovereign when defining the commonwealth as:

> . . . one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence. And he that carries this person, is called sovereign, and said to have sovereign power; and every one besides, his subject . . . [29]

In few words, the people have contracted to obey the sovereign (who can be one person, a few or many) since that situation is better than living in anarchy. Nonetheless, the sovereign has made no promises so he may treat them as he pleases and the population must never go against the sovereign's orders.[30] The sovereign cannot—at least logically—be unjust to the people since he is not breaking any contract and the people agreed to obey him−i.e. the positivist claim.

Despite the fact that Hobbes' idea of sovereignty appears to be completely absolute, unlimited,[31] he makes a deep distinction that arguably goes against that theory: "[f]or it is one thing if I say, I give you the right to command what you will; another, if I say, I will do

[23] Hinsley (1986), pp. 122–123; García Gestoso (2003), pp. 318–319.
[24] Bodin (1903), Book I, Chapter 8.
[25] Hinsley (1986), p. 141.
[26] Hobbes (1972), p. 188.
[27] Hobbes (1955), p. 5.
[28] Hobbes (1955), p. 112.
[29] Hobbes (1955), p. 112.
[30] Hobbes (1955), p. 114.
[31] Hobbes (1972), pp. 180–181.

whatsoever you command."[32] Although it may seem that Hobbes supported the idea of an omnipotent government and absolute sovereign he is particularly keen on securing the citizens' wellbeing. In this line of interpretation, Hobbes himself limits what he characterised before as absolute sovereignty when expressly says that:

> [t]he safety of the people is the supreme law. For although they who among men obtain the chiefest dominion, cannot be subject to laws properly so called, that is to say, to the will of men, because to be chief and subject are contradictories; yet is it their duty in all things, as much as possibly they can, to yield obedience unto right reason, which is the natural, moral, and divine law. […] [H]e, who being placed in authority, shall use his power otherwise than to the safety of the people, will act against the reasons of peace, that is to say, against the laws of nature . . .[33]

Further evidence supporting the argument that Hobbes' sovereignty was limited is present in the Leviathan when he makes clear the subordination of human law in respect to divine natural law. Moreover, he places the immortal God above the mortal god or the Leviathan (or the sovereign). In his own words:

> This is more than consent, or concord; it is a real unity of them all, in one and the same person . . . as if every man should say to every man, I author and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and author all his actions in like manner. This done, the multitude so united in one person, is called a commonwealth, in Latin *civitas*. This is the generation of that great Leviathan, or rather, to speak more reverently, of that mortal god, to which we owe under the immortal God, our peace and defence.[34]

From the previous quotations it is at least questionable how absolute sovereignty is in Hobbes' theory. Indeed, there are here substantive limitations to sovereignty. That is to say, sovereignty for Hobbes seems to be absolute but his theory includes limitations that are not part of the concept itself. Hobbes' idea of absoluteness in sovereignty has to do with beliefs, assumptions, and justifications that are a response to the events of that time and place in history. But the substance of his account does not match the purpose.

Firstly, for Hobbes the power of the Leviathan is restricted, at least practically, if not absolutely, by rules of natural law. In tune with this, the fact that he recognises a super-empirical authority such as God over the Leviathan adds a constraint that is not part of the concept of sovereignty itself. In other words, that constraint is substantive in effect as it brings moral and religious values in the interpretation of what a sovereign can do. Clearly, Hobbes separates between what he calls a 'mortal god,' his Leviathan and the 'immortal God.' In tune with this, the immortal God has a superior position in relation to the Leviathan. It is true that there is no precise account of this immortal God and the extent of his powers in what matters the Leviathan. But, in what is of interest to this chapter, the Leviathan sees its position limited by that of a superior.

[32] Hobbes (1972), p. 182.
[33] Hobbes (1972), p. 258.
[34] Hobbes (1955), p. 112.

Secondly, we have seen that people have contracted to obey the sovereign, the Leviathan, who can be one person, a few or many−i.e. both sovereignty and its limitations are for Hobbes social facts regardless of their merit or demerit. There are limitations in two ways here: related to the Leviathan and related to the Leviathan and the citizens. Clearly, the Leviathan can be a parliamentary assembly, an artificial personality, so we would have reciprocal limitations amongst the assembly members, at least of practical nature. More importantly, and in what has to do with citizens' wellbeing, it has been maintained that Hobbes' theory is incompatible with his defence of absolute sovereignty.[35] Expressions such as 'safety of the people' that are present in the previous quotations seem at least to make us doubt about how absolute sovereignty is for Hobbes. Debates in relation to this point have existed since Hobbes' time[36] and are contemporarily seen as the Achilles' heel of his theory.[37]

3.3. Not only Bodin and Hobbes

Bodin and Hobbes are arguably the main figures in the modern era with regard to the notion of state sovereignty and its absoluteness. However, there are others that develop theories of sovereignty later in this historical period—i.e. what I call the latter days in the modern era. In the following paragraphs some of these authors are very briefly introduced with the only aim to demonstrate that their theories followed those of Bodin and Hobbes, but arguably they all introduce more evidently notions of limited sovereignty. Moreover, all these subsequent theories are based on social contracts and hence, they maintain that law existence depends on social standards−i.e. legal positivist claim. Their analysis in depth will be left, however, for subsequent discussion.

Like Hobbes, Locke and Rousseau understand state sovereignty as focused on the relationship between represented and representative.[38] But in different ways from Hobbes, these theorists expressly acknowledge limitations. On the one hand, Locke introduces a clearer notion of limited sovereignty.[39] His theory opposes Hobbes'; Locke's notion of the contract between the people and the sovereign implies that both have made promises and if the sovereign violates them, then the people have a right to remove him, by force if necessary. The main objective of political power is to protect private property (as he mentions several times throughout his Treatises).[40] The aim is also protection of the individuals' part of the society so as to reach a general state of wellbeing. On the other hand, we arrive with Jean-Jacques Rousseau to the climax of social contractualist theories. For Rousseau the particular wills that once existed independently give way to a common will and the state is born. In other words, the collective subject is the real sovereign, but each and every individual subject who is integrated into that collective has a proportional part of sovereignty; so their sovereignty is mutually limited.[41]

In that same historical period, Kant seems to concede unlimited power to the representatives once they become chosen authorities.[42] But he includes limits both at national

[35] Lloyd and Sreedhar (2008).
[36] Lloyd and Sreedhar (2008).
[37] Lloyd and Sreedhar (2008); Curran (2006), (2007).
[38] Lowe (2005), pp. 161–163.
[39] Merriam (2001), pp. 16–17.
[40] Hinsley 1986: 149; Locke 1993
[41] Rousseau (1988), p. 231.
[42] Gregor (1998), pp. 95–96.

and international level to sovereignty. At national level, his first definitive article in Perpetual Peace clearly highlights the necessity of a republican constitution within a representative system.[43] At the international level, it is essential to create an interstate system and hence, mutual limitations amongst states appear.[44] Finally, for Hegel the state is a rational idea with ethical content.[45] Therefore, he maintains that individuals have the duty to be members of it.[46] In relation to internal affairs, sovereignty for Hegel is an attribute that characterises a state and the relationship between the population and the monarch. The two parties are mutually necessary in order for the state to exist, and so, they are reciprocally limited. In what matters to external sovereignty (or international affairs), each state's sovereignty is limited by that of its peers.[47]

4. Conclusion

This chapter examined the concept of 'sovereignty' and has shown that it is a limited one. In order to show the limitations we followed mainly two lines of analysis: a) conceptual or theoretical; and b) historical. Firstly, we considered the concept of 'sovereignty' and some kinds of limitations or restrictions that are perfectly in tune with its nature. Secondly, we identified some theories or bodies of literature that show how sovereignty had in one way or another limitations.

The modern era sees a secular power trying to separate itself from the Church and at the same time to obtain total control over its affairs. Indeed, all these accounts include a legal positivist claim—i.e. in fact they are the roots for our current views on legal positivism. The law exists only and only because of socially accepted standards and not its merits or demerits. Bodin is the first one to give name to these phenomena: the word 'sovereignty' is used since then in political and legal discourse. Other legal and political philosophers, namely Hobbes, Locke and Rousseau, understand State sovereignty as focused on the relationship between represented and representative.[48] The interesting fact is that for different reasons, they all limit sovereignty within this mutual relationship.[49]

One practical consequence of these theories is that they are applied between the 17th and 19th centuries with the creation of new national legal orders worldwide with the same result: sovereignty assumes a legal positivist claim and is limited at national level. The era of the Empires gives way to that of the constitutional republics with the characteristic of including the idea of separation of powers—e.g. United States of America, Argentina and most of the American countries that achieved their independence adopted a republican constitution with separate executive, legislative and judicial powers. There is no longer only one supreme authority; or better, there is one supreme authority divided into three different areas with representatives for each office limiting reciprocally their spheres of influence, without necessarily reciprocally checking their activities. That is to say, it may appear to be one way of limiting sovereignty but in fact we find here two limitations that may work together but do not need to, namely a) the 'separation of powers;' and b) the 'checks and balances system.'

[43] Gregor (1998), pp. 99–102.
[44] Gregor (1998), p. 114.
[45] Knox (1967), p. 155
[46] Knox (1967), p. 156.
[47] Knox (1967), pp. 212–213.
[48] Lowe (2005), pp. 161–163.
[49] For an extensive analysis of essential differences in the arguments of Hobbes, Locke and Rousseau, see Hinsley (1986), pp. 153–154; Van Creveld 2004: Chapter 3, 177 and ff.

As a result, 'separation of power' implies that the sovereign power of a state is divided in different branches and 'checks and balances system' that these different branches can reciprocally check the activities of the other branches in order to keep a balance of power. However, 'division of power' does not necessarily imply the 'checks and balances system'—i.e. the 'checks and balances system' may or may not be part of the legal order of a state even though that state has 'division of power.'

Understanding sovereignty as limited rather than absolute enables scholars and practitioners to assess and work with the fragmentation of regulatory sources and dynamics at national, transnational and global level that is perfectly compatible with the nation-state inner pluralist settings.

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